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No. _____

IN THE

Supreme Court of the United States

RAYMON F. THOMAS, JR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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Question Presented:

Whether a court of appeals abuses its discretion when, after a majority of charges are reversed due to constitutional error, it fails to remand a case to the trial court for resentencing and instead imposes the exact same sentence?

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PETITION FOR A WRIT OF CERTIORARI

Raymon F. Thomas, Jr., a seventeen-year member of the United States Marine Corps, and an officer commissioned by the President of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (CAAF) is reprinted in Appendix A at 1a. The last Thomas opinion by the Navy-Marine Corps Court of Criminal Appeals (NMCCA), Thomas II, is reprinted in Appendix B, at 2a-4a. The CAAF's remand of the Thomas case is reprinted in Appendix C, at 5a-6a. The first Thomas opinion by the NMCCA, Thomas I, is reprinted in Appendix D, at 7a-9a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(3), which permits "review of cases in which the Court of Appeals for the Armed Forces granted a petition for review." The CAAF granted review of First Lieutenant Thomas' petition for review on April 25, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 14 of the United States Constitution vests with Congress the authority "To make Rules for the Government and Regulation of the land and naval Forces."

STATEMENT OF THE CASE

A. Facts

1st Lt Thomas served for seventeen years in the United States Marine Corps, enlisting in the Marine Corps Reserve (USMCR) in 1985,[1] and commencing continuous active duty on 31 May 1986.[2] He was selected and received orders for a program providing full-time training and administration of Marine reservists, Full Time Support (FTS), in September 1987.[3]

1st Lt Thomas served on active duty with the Marine Corps for eleven years in the enlisted ranks, receiving two meritorious promotions, a Presidential Service Badge and aircrew warfare wings; 1st Lt Thomas served as a legal clerk, service record book clerk and unit diary clerk at Cherry Point, North Carolina; Kaneohe Bay, Hawaii; and Okinawa.[4]

In September 1996, at age 33, after 1st Lt Thomas received his degree from Southern Illinois University, the Marine Corps selected him for the Enlisted Commissioning Program.[5] After graduating

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[1] R. at 115, 116, 117, 211.
[2] R. at 115, 193.
[3] Appellant's affidavit, Dec. 13, 2006.
[4] R. at 195-197; Appellant's affidavit.
[5] R. at 207, 208; Appellant's affidavit.

from Officer Candidate School. 1st Lt Thomas served as an adjutant and executive officer providing administrative and personnel support for various squadrons in Okinawa, Japan, and at Marine Corps Headquarters, Henderson Hall in Washington, D.C.[6] 1st Lt Thomas also served as Officer-in-Charge of centralized administration at Marine Corps Air Station, Futenma, Okinawa, Japan, between April 2000 and December 2000.[7]

1st Lt Thomas was a "frocked" Captain (O-3E) within fifteen days of receiving Captain's pay when he was charged in April 2001.[8] At the time of his trial, 1st Lt Thomas had been married for seventeen years, with two children and one grandchild on the way.[9] 1st Lt Thomas would have been eligible for retirement in October 2006.[10]

The two specifications that remain in this case involve two instances of conduct unbecoming an officer. The offenses center on inappropriate sexual conversations — what the military judge characterized as "a lot of banter back and forth...of a very sexual nature"[11] between 1st Lt Thomas and female enlisted Marines at Headquarters Battalion, Henderson Hall. Two of 1st Lt Thomas' female subordinates, Private First Class (PFC) Santos, USMC, and Lance Corporal (LCpl) Corrigan, USMC, were assigned to his division while they awaited non-

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[6] R. at 120-121, 126, 129, 198; Appellant's affidavit.

[7] R. at 125; Appellant's affidavit.

[8] "Frocked" means that 1st Lt Thomas was able to wear the uniform and unofficially assume the rank of a Captain. R. at 199-200.

[9] R. at 185,186.

[10] Appellant's affidavit.

[11] R. at 130.

judicial punishment and administrative separation from the Marine Corps for illegal drug use and ID card fraud.[12]

1st Lt Thomas participated in sexually oriented conversations with PFC Santos and LCpl Corrigan. Although his subordinate Marines often initiated the raunchy humor, 1st Lt Thomas played along, to include asking one female Marine if she ever had sex with a 37 year-old black man; gesturing toward his crotch to indicate he was horny; asking how far his penis would go in her; asking if she liked oral sex; and quipping, "Boy, would I love to fuck you right now."[13]

The charge sheet and language from the decision below allege that 1st Lt Thomas offered "specific *quid pro quo*...time off from work in return for sex."[14] 1st Lt Thomas, however, contested that he ever made such an offer; he was making a crude joke.

B. Proceedings Below

A general court-martial, consisting of a military judge alone, tried 1st Lt Thomas on 13 June and 2 August 2002. Initially, 1st Lt Thomas pleaded guilty to two specifications of disobeying a lawful general regulation, not-guilty to five specifications of maltreatment by sexual harassment, guilty to nine specifications of sexually-based conduct unbecoming an officer, guilty to four of nine specifications of sexually-based service-discrediting conduct, and guilty to an additional charge of fraternization, in

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[12] R. at 129, 130; Appellant's affidavit.

[13] Record at 130-132; Appellant's affidavit.

[14] Charge Sheet, Charge III, Spec. 3; *United States v. Thomas*, No. 200401149, slip. op. (N-M. Ct. Crim. App. June 20, 2006).

violation of Articles 92, 93, 125, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 925, 933, and 934 (2000).

Much confusion resulted in this case regarding the proper accounting of 1st Lt Thomas' charges and specifications. The CAAF remanded this case on 2 May 2007 to NMCCA as a result of the lower court's incorrect summary of the affirmed findings. App. C at 5a-6a.

The following table summarizes the original charges and specifications 1st Lt Thomas faced at his court martial, his pleas, the military judge's findings, and the lower court's corrective action:

Ch	Art	Spc	Summary of Offense	Plea	MJ	CCA Chng
I	92	1	Fail to obey gen.reg	G	M[15]	-
		2	Fail to obey gen.reg	G	M[16]	-
II	93	1	Maltreatment	NG	WD	-
		2	Maltreatment	NG	WD	-
		3	Maltreatment	NG	WD	-
		4	Maltreatment	NG	WD	-
		5	Maltreatment	NG	WD	-
III	133	1	Conduct Unbecoming	G	MRGE	Set Aside
		2	Conduct Unbecoming	G	G	Set Aside
		3	Conduct Unbecoming	G	G	Affirmed
		4	Conduct Unbecoming	G	G	Affirmed
IV	134	1	Wrongful sex. intrcse	G	M[17]	-
		2	Wrongful sex. intrcse	G	G	Set Aside
		3	Indecent assault	NG	WD	-
		4	Indecent assault	NG	WD	-
		5	Indecent assault	NG	WD	-
		6	Indecent assault	NG	WD	-
		7	Wrongful exposure	NG	WD	-
		8	Wrongful exposure	NG	WD	-
		9	Fraternization	NG	WD	-
AC	134	-	Fraternization	G	M[18]	-

[15] Merged into Charge III, Specification 2 (R. at 159).
[16] Merged into Charge III, Specification 1 (*Id.*).
[17] Merged into Charge III, Specification 2 (*Id.*).

1st Lt Thomas originally faced five charges, supported by twenty-one separate specifications.[19] However, after the government conceded multiplicity, the military judge ordered four of the specifications merged into two other charges and specifications, reducing the remaining number of specifications to seventeen.[20] In addition, pursuant to the terms of a pretrial agreement, the government withdrew twelve specifications under two of the charges to which 1st Lt Thomas pleaded not-guilty, leaving a total of five specifications under two charges.[21]

1st Lt Thomas pleaded guilty pursuant to a pretrial agreement, wherein a condition of the plea included preserving a motion to suppress evidence derived from a warrantless government search of his government e-mail account.[22]

Pursuant to his conditional pleas, the military judge found 1st Lt Thomas guilty to five specifications under two charges in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934 (2000).[23]

The military judge sentenced 1st Lt Thomas to be confined for 165 days and to be dismissed.[24] The convening authority approved the sentence as

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[18] Merged into Charge III, Specification 1 (*Id.*).
[19] Record at 97-101; Appellate Exhibit XIX.
[20] R. at 158-159.
[21] R. at 159.
[22] Appellate Exhibit XV.
[23] R. at 162.
[24] R. at 211.

adjudged, and, except for the dismissal, ordered it executed.[25]

At his trial, during the plea colloquy with the military judge, known in the military justice system as "providency," the following inquiry occurred:

> MJ: Did you offer her[26] time off her job in exchange for sexual favors?
> ACC: No, sir, I didn't.
> MJ: You did not?
> ACC: I did not.[27]

The military judge then pressed 1st Lt Thomas on whether he was willing to plead guilty to this language. 1st Lt Thomas stated: "This was her [PFC Santos'] interpretation of how she worded this as far as me giving her time off..."[28] 1st Lt Thomas explained that earlier that day, during the lunch hour, PFC Santos had sex with a married Marine. The context of 1st Lt Thomas' joke was to hint at doing something similar during "chow time."[29] While there was a mention of sex, the record does not reflect that 1st Lt Thomas made an offer for "time off of work." Neither does the record reflect such a direct concession to the military judge.

Based solely on the two specifications of conduct unbecoming an officer, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed 1st Lt Thomas' dismissal from the United States Marine Corps.

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[25] General Court-Martial Order 4-2003, dated 04 August 2004.
[26] Referring to PFC Santos, USMC.
[27] R. at 130.
[28] R. at 134.
[29] R. at 134; Appellant's affidavit.

Initially, however, these two specifications were peripheral to a sixteen-month CID investigation resulting in twenty-one specifications supporting five charges of orders violations, maltreatment by sexual harassment, conduct unbecoming an officer, ongoing adultery, sodomy, and fraternization.[30]

The military judge stated on the record that he was sentencing First Lieutenant Thomas to a dismissal primarily based on charges of ongoing adultery and a pattern of sexual harassment with four different victims.[31]

The military judge first stated that "this was a very difficult and not an easy case to handle. Obviously... Lieutenant Thomas has had a long and, but for these charges, very nice career. Obviously, he's dedicated to the Marine Corps in many ways, and he has a very nice family who came in and is in the courtroom."[32]

The military judge then explained how he made a sentencing determination in this case: "I look at the number of different people involved in the specifications and the length of time it went on for and the amount of different times it went on for. In other words, it wasn't a one-time lapse in judgment, but a sustained lapse in judgment...over a number of years, continuing in a number of different duty stations."[33] The military judge then reiterated that the sentence "was very difficult, and I am sorry to your family."[34]

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[30]Charge Sheet; Appellate Exhibit XIX; Appendix B; Appellant's affidavit.

[31] R. at 214.

[32] R. at 213.

[33] Record at 214.

[34] R. at 214.

The military judge sentenced 1st Lt Thomas to a dismissal from the Marine Corps as a result of four charges, including failing to obey a regulation, wrongful sexual intercourse, fraternization, and conduct unbecoming an officer. All of which was based on a constitutional error that permitted a warrantless search of 1st Lt Thomas' computer.

After the court of appeals set-aside the charges resulting from the unconstitutional warrantless search, only two specifications, under one charge, remained in this case. Both specifications involve two instances of conduct unbecoming an officer. The offenses center on inappropriate sexual talk.

REASONS FOR GRANTING THE PETITION

The court of criminal appeals abused its discretion and the customary practice of all states and all federal circuits by failing to remand 1st Lt Thomas' case to the trial court for resentencing.

Seldom does an appellate court reverse the findings on the majority of charges due to constitutional error, fail to remand the case for resentencing, and instead impose the exact same sentence. *See*, for example, this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), where the case was remanded to the district court for resentencing as a result of constitutional error.

Failure to remand a case for resentencing after constitutional error violates long-established sentencing practices, is illogical, and results in a miscarriage of justice.

The issue of remanding a case for resentencing after constitutional error also manifests a conflict among the federal courts of appeals. All federal

circuits routinely remand cases to the district court for resentencing, if error is discovered on appeal. But there exists an open question as to whether the Court of Appeals for the Armed Forces (CAAF) maintains the authority under the Uniform Code of Military Justice (UCMJ) to similarly remand a case to the trial court for sentencing.

NMCCA's sentencing procedures produced an unreliable and unfair result in 1st Lt Thomas' case. The court of appeals excused constitutional error by essentially stating that a warrantless search producing several of the most significant charges made no difference.

The unique sentence in this case seriously undermines the goal of sentence uniformity. A central tenet of the sentencing guidelines, for example, was an effort by Congress to reduce sentencing disparities. "The goal of the Sentencing Guidelines is . . . to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. 81, 113 (1996).

But 1st Lt Thomas' sentence was highly disparate. No other officer has been dismissed from the military for conduct similar to 1st Lt Thomas' conduct in this case. Dismissals are usually reserved for serious crimes, mostly felonies, and not the equivalent of raunchy jokes or sexual harassment.

Giving the same sentence for only two remaining specifications as for nine specifications improperly exaggerates the gravity of the remaining offenses and imports, by stealth, and without any argument, new aggravating factors.

1st Lt Thomas requests that this Court remand his case to a trial court for a full and fair sentencing argument focused only on the crimes on which he was convicted. The military appeals courts below have denied 1st Lt Thomas his right to put on a defense at his sentencing.

I. There Is a Conflict between the CAAF and the Federal Courts of Appeals Over the Authority to Remand a Case for Resentencing.

There is a conflict between the federal courts of appeals and the Court of Appeals for the Armed Forces (CAAF) about the authority to remand for resentencing after error.

This conflict evolved starting with the habeas case of Chester Jackson. *Jackson v. Taylor*, 353 U.S. 569 (1957). Jackson was a soldier stationed in Korea who was convicted, with two others, of premeditated murder and attempted rape. He was sentenced to life in prison, as were his co-accused. The Army Board of Review found the murder convictions unsupported in law and fact, upheld the attempted rape convictions, and affirmed sentences that included confinement for 20 years, the maximum authorized for attempted rape.

The Court of Military Appeals affirmed and all three filed habeas corpus petition in federal court.

The three accused were confined in separate facilities in different states. The petitioner, Jackson attacked "the sentence of the board alleging that 'the action of the Review Board in reserving twenty (20) years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reserved and set aside the conviction, was null and

void.'" *Id.* at 571.

The district and circuit court of appeals rejected Jackson's claim, but one of his co-accused prevailed on the same issue in a different circuit.

This Court granted certiorari to resolve the conflict on the "gross sentence" question.

Jackson's argument was essentially this: the law officer told the members that they could sentence him to death or life in prison. Because Jackson was sentenced to life in prison on the *murder* charge, he was not sentenced on the attempted rape. Since the murder charge was dismissed, he should have a rehearing on the sentence for the attempted rape or be released because the Army Board of Review did not have authority to sentence him. This Court affirmed the lower court's denial of his petition.

> Petitioner objects, however, that the board of review should not have imposed the maximum sentence for attempted rape because the court-martial might have imposed a lesser sentence had it considered the matter initially. But this is an objection that might properly be addressed to Congress. It has laid down the military law and it can take it away or restrict it. The Congress could have required a court-martial to enter a sentence on each separate offense just as is done in the civilian courts. The board of review would then know the attitude of the court-martial as to punishment on each of its findings of guilt. But this the Congress did not do. The argument, therefore, falls since it is based on pure conjecture. No one could say what sentence the court-martial would have

imposed if it had found petitioner guilty only of attempted rape. But Congress avoided the necessity for conjecture and speculation by placing authority in the board of review to correct not only the findings as to guilt but the sentence as well. Likewise the apportionment of the sentence that the court-martial intended as between the offenses would be pure speculation. But because of the gross sentence procedure in military law we need not concern ourselves with these problems. Military law provides that one aggregate sentence must be imposed and the board of review may modify that sentence in the manner it finds appropriate. To say in this case that a gross sentence was not imposed is to shut one's eyes to the realities of military law and custom.

Finally the petitioner suggests that the case should be remanded for a rehearing before the court-martial on the question of the sentence. We find no authority in the Uniform Code for such a procedure and the petitioner points to none. The reason is, of course, that the Congress intended that the board of review should exercise this power. This is true because the nature of a court-martial proceeding makes it impractical and unfeasible to remand for the purpose of sentencing alone. Even petitioner admits that it would now, six years after the trial, be impractical to attempt to reconvene the court-martial that decided the case

> originally. A court-martial has neither continuity nor situs and often sits to hear only a single case. Because of the nature of military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded. Recognizing the impossibility of remand to the same court-martial, petitioner suggests as an alternative that the case should be remanded for a rehearing before a new court-martial. He admits that it would now be impractical for such a new court-martial to hear all of the evidence, and that the court would have to make its sentence determination on the basis of what it could learn from reading the record. Such a procedure would merely substitute one group of nonparticipants in the original trial for another. Congress thought the board of review could modify sentences when appropriate more expeditiously, more intelligently, and more fairly. Acting on a national basis the board of review can correct disparities in sentences and through its legally-trained personnel determine more appropriately the proper disposition to be made of the cases. Congress must have known of the problems inherent in rehearing and review proceedings for the procedures were adopted largely from prior law. It is not for us to question the judgment of the Congress in selecting the process it chose.

Id. at 578-80 (footnotes and citations omitted).

Nearly 30 years later, in *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985), Chief Judge Everett of the Court of Appeals for the Armed Forces (CAAF) (then CMA) moved that court much closer to the customary practice of the other federal courts of appeals:

> However, when prejudicial error has occurred in a trial, not only must the Court of Military Review assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also it must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. Only in this way can the requirements of Article 59(a), UCMJ, 10 U.S.C. § 859(a), be reconciled with the Code provisions that findings and sentence be rendered by the court-martial, see Articles 51-52, UCMJ, 10 U.S.C. §§ 851 and 852, respectively.

The following year, writing for the CAAF, Chief Judge Everett said the following:

> Although reassessment does not provide the accused an opportunity to be present or to offer new evidence in mitigation and extenuation, this procedure complies with constitutional requirements, *see Jackson v. Taylor*, 353 U.S. 569 (1957) and it has often been employed by Courts of Military Review without criticism from this Court. Of course, if the error at trial was one of constitutional magnitude, then it would seem necessary that the Court of Military Review should be

> persuaded beyond a reasonable doubt that its reassessment has rendered harmless any error affecting the sentence adjudged at trial. *Cf. United States v. Ramai*, 19 M.J. 229 (C.M.A. 1985); *see Chapman v. California*, 386 U.S. 18 (1967).

United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986).

In military parlance, the process of an appellate court reassessing a sentence after discovering error, by itself, without remanding the case to the trial court, is known as the "Sales doctrine."

The military's Sales doctrine seems similar to the doctrine of the federal courts of appeal. For example, in statutory error cases, "[i]f one can say 'with fair assurance ... that the [sentence] was not substantially swayed by the error,' the [sentence] is due to be affirmed even though there was error." *United States v. Hornaday*, 392 F.3d 1306, 1315-16 (11th Cir.2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762, 764, 66 S.Ct. 1239, 1246, 1248, 90 L.Ed. 1557 (1946)).

The military's Sales doctrine mirrors the federal courts of appeals in constitutional error cases, too. Constitutional error requires application of the "beyond a reasonable doubt" test, instead of the "fair assurance" test, to determine whether the Government has established harmless error. Specifically, in constitutional error cases, the Government must prove beyond a reasonable doubt "the mandatory, as opposed to the advisory, application of [sentencing] guidelines did not contribute to the defendant's sentence." *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir.2005).

The Sales doctrine has evolved in the military to require the courts of appeal to remand the case to a trial court for resentencing under two circumstances: first, when after *prejudicial* error, the appeals court is not "confident" that it could reliably determine what sentence would have been imposed at trial; and second, after *constitutional* error, the appeals court may not conclude "beyond a reasonable doubt" that the same sentence would have been imposed at trial.

In other word, the Sales doctrine defers to the authority of the sentencing court and usually only reassess a sentence itself if the errors are so minor that they obviously would not affect the sentence.

But there is a conflict between CAAF and the other courts of appeals in two respects. First, there is a question as to whether the CAAF even has the authority under the UCMJ to remand a case for resentencing, whereas other courts of appeals unquestionably possess that power. Second, there is a conflict between the practice of the CAAF and the practice of the other courts of appeals. Whereas most courts of appeals routinely remand cases to the district court for resentencing, military appeals courts almost never remand cases for sentencing.

II. The Court of Appeals Should Have Remanded This Case to the Trial Court for Resentencing.

This case should have been remanded for sentencing. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) could not make a reliable determination, as required by the CAAF's precedents and the usual practice of the federal circuits and of state appellate courts, as to the

minimum punishment the judge (or jury) would have imposed.

A remand for sentencing was necessary. Only two specifications alleging conduct unbecoming an officer by means of inappropriate sexual conversations remained. The sentencing landscape in this case changed dramatically after the adultery charges and a majority of the sexual harassment charges were set aside. Had the remaining charge and two specifications stood alone, 1st Lt Thomas might not even have been tried by court-martial. Given the mitigating evidence of good duty performance and lengthy Marine Corps career, the reassessment by NMCCA did not cure the error at trial and the affirmation of the dismissal was an abuse of discretion and a miscarriage of justice.

The court of criminal appeals failed to apply the applicable standards for reassessment, reiterated by the CAAF two years ago in *United States v. Buber*,[35] and derived from *United States v. Sales*[36] and *United States v. Suzuki*.[37] Under *Buber*, the reassessment must be based on a conclusion that the sentence that would have been imposed at trial absent the error would have been at least of a certain magnitude.[38] A dramatic change in the penalty landscape gravitates away from the ability to reassess.[39] The CAAF must overturn a court of criminal appeals reassessment of a sentence where it cannot be "confident" that the

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[35] 62 M.J. 47 (C.A.A.F. 2006).

[36] 22 M.J. 305 (C.M.A. 1986).

[37] 20 M.J. 248 (C.M.A. 1985).

[38] *Buber* at 479 (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)).

[39] *Buber* at 479; (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

appeals court could reliably determine what sentence would have been imposed.[40]

In this case, the military judge's reasonable explanation of how he made a sentencing determination in 1st Lt Thomas' case stands in stark contrast to the terse two sentences from the Navy-Marine Corps Court of Criminal Appeals (NMCCA), that 1st Lt Thomas offered "specific *quid pro quo*...time off from work in return for sex," and that such behavior was "unconscionable."[41] Whereas the military judge considered such factors as the length and quality of 1st Lt Thomas' service, the impact on his family, the number of victims, the nature and longevity of the misconduct, and its impact, NMCCA provided no such sentencing criterion, instead, offering the minimalist conclusion that 1st Lt Thomas' conduct was "unconscionable."[42]

NMCCA thus erred in its reassessment of 1st Lt Thomas' sentence in numerous ways. First, NMCCA used the wrong legal standard; because the error at trial was of constitutional magnitude, NMCCA must have been satisfied beyond a reasonable doubt that its reassessment cured the error. But NMCCA erred when it did not use this standard.

Second, NMCCA confused its usual role in judging sentence appropriateness, where it may

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[40] *Id.* at 479.

[41] Charge Sheet, Charge III, Spec. 3; *United States v. Thomas*, No. 200401149, slip. op. (N-M. Ct. Crim. App. June 20, 2006); Compare, *Thomas*, p. 2 (that Appellant offered "specific quid pro quo...time off from work in return for sex," and this was "unconscionable.") with Record at 213, 214 (the military judge's iteration of sentencing factors and the difficulty of deciding this case.)

[42] Id.

apply its own standards, with reassessment, where the court must explicitly "step into the shoes" of the sentencing authority to "reliably determine" what sentence it would have imposed.[43]

Third, NMCCA did not have a large enough population of officer cases resulting in a sentence of dismissal to derive reliable conclusions and have "confidence" that a dismissal would have been awarded by the sentencing authority.

Fourth, NMCCA did not compare and contrast the sentencing landscape before and after the prejudicial error was corrected to determine whether there was a "dramatic change in the penalty landscape."[44]

Fifth, NMCCA did not provide any measure of "confidence" that the sentence was no greater than would have been imposed at trial if the prejudicial error had not been committed.[45]

Sixth, NMCCA did not consider strong historical evidence that because other administrative remedies were available, inappropriate sexual conduct or sexual conversations do not always result in court-martial proceedings or dismissal.

Finally, NMCCA may have improperly considered, *sub silencio,* conduct in its sentence reassessment that should not have been before the court at all.

1st Lt Thomas deserves a fair sentence rehearing focused only on the two remaining specifications of

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[43] *Buber* at 479, quoting *Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003); *See also*, *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000).

[44] *Buber* at 479, quoting *Riley*, 58 M.J.

[45] *Buber* at 479, quoting *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999).

conduct unbecoming an officer, with no extrinsic charges and specifications, which cause intractable "spillover" problems.

1. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) erred in its sentence reassessment because it used the wrong legal standard: Because the error at trial was of constitutional magnitude, NMCCA must have been satisfied beyond a reasonable doubt that its reassessment cured the error.

NMCCA did not properly apply the principles of *United States v. Sales*.[46] Because the military judge's failure to suppress a warrantless government search violated 1st Lt Thomas' rights under the Fourth Amendment, it was thus of a constitutional magnitude. As a result, NMCCA was required to find "beyond a reasonable doubt" that its reassesssment cured the error.[47] But NMCCA did not do so.

NMCCA simply stated: "We specifically find that the sentence in this case is appropriate and that the sentence is no greater than that which would have been imposed at trial if the prejudicial error had not been committed."[48] But a "specific" finding is not the same as a finding "beyond a reasonable doubt." NMCCA therefore used the wrong legal standard to reassess 1st Lt Thomas' sentence.

2. NMCCA erred in its reassessment because the court confused its usual role in judging sentence appropriateness, where it may gene-

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[46] 22 MJ 305 (CMA 1986).

[47] Id. at 307.

[48] *Thomas*, at 2.

rally apply its own standards, with reassessment, where the court must explicitly "step into the shoes" of the sentencing authority to "reliably determine" what sentence the sentencing authority would have imposed.[49]

In this case, NMCCA failed to "step into the shoes" of the sentencing authority. For example, the court's pronouncement in its decretal paragraph reads less like an individualized consideration of a sentence for this particular Appellant under the specific circumstances of his case than it does a policy statement. While the judges on the NMCCA panel below may have themselves awarded a dismissal to 1st Lt Thomas had they comprised the sentencing authority, they did not constitute the sentencing authority: The military judge was the sentencing authority.

And the military judge explained his own difficulty in sentencing 1st Lt Thomas to a dismissal even *under* the prejudicial error, with far *more* charges and specifications before him than were before NMCCA. Yet the court below made no attempt to "step into the military judge's shoes" at the time of sentencing. The principles of vicarious sentencing announced by the CAAF in *Buber*, *Taylor*, *Riley* and *Vasquez* were violated by NMCCA's failure to "reliably determine" what sentence the military judge would have imposed.[50]

1st Lt Thomas' case is far better postured than *United States v. Eversole*,[51] where the CAAF set

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[49] *Buber* at 479, quoting *Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003).
[50] *Buber*, 62 M.J. 476, 479; *United States v. Vasquez*, 54 M.J. 303, 306 (C.A.A.F. 2001).
[51] 53 M.J. 132, 133 (C.A.A.F. 2000).

aside the Army court's sentence reassessment, despite a much less dramatic change in the sentencing landscape from four charges to three, and a sentence reduced from six months to three months.

1st Lt Thomas' trial defense attorney offered the best rationale for a sentence rehearing (before members) in his original sentencing argument on behalf of his client:

> Allow the line officer, the ground officer, the air officer, whoever he or she may be, to make that choice in this case. In other words, let's take the lawyers out of that process. Let's give it back to the people who it affects the most and allow them, if that's what they decide to do, to make that decision.[52]

3. NMCCA erred in its sentence reassessment because it did not have a large enough population of officer cases or cases resulting in a sentence of dismissal to derive reliable conclusions.

Dismissals are so rare that NMCCA did not have a sufficient sample to derive reliable conclusions – or what statisticians refer to as data "stability." Just as no poll or survey can be accurate when the sample is too small, the same principles apply to the sample population of officer court-martials. If there are not enough "data points" (*i.e.*, officer court-martials), then no court may make any reliable conclusions

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[52] Record at 208.

about the data. Yet reliability is precisely what the *Sales* progeny demands.

Although it may be obvious, dismissals are rare. Of the 623 decisions by the Navy-Marine Corps Court of Criminal Appeals since 2004, only 36 – or 5.8% of its opinions — involve an officer charged with a court-martial offense. Two conclusions flow from such a low percentage of cases resulting in a dismissal. First, NMCCA did not have a sufficient number of data points to have "confidence" in its sentence reassessment as required by *Sales*. Second, the offenses committed by 1st Lt Thomas do not compare in gravity with those committed by other officers who received a dismissal.

First, NMCCA did not have a sufficient number of data points, as compared to the high number of enlisted cases, to have confidence in the sentence. Many enlisted cases involve pervasive military offenses such as unauthorized absence, disobedience to orders, or drug use, where the sample is sufficiently large to draw and reliable history of sentencing ranges yield "confidence" in the sentence But 1st Lt Thomas lacks a genealogy of similar cases.

Second, the offenses committed by 1st Lt Thomas do not compare in gravity – either qualitatively or quantitatively – with the offenses committed by other officers. Of the mere 36 decisions by NMCCA since 2004 only involving an officer charged with a court-martial offense, a large majority of these cases resulted from multiple charges and egregious offenses, such as rape, manslaughter, larceny, fraud, child molestation, and child pornography. 1st Lt Thomas' offenses of making inappropriate sexual comments do not compare with these offenses.

1st Lt Thomas' two offenses may not be characterized as equivalent to felonies. The equivalent of a sentence of dismissal for an officer is a dishonorable discharge, tantamount to a felony conviction, for an enlisted member. The Department of Defense (DoD) states that a dismissal is a punitive discharge to characterize the separation of an officer under conditions of dishonor.[53] DOD provides persuasive authority to properly distinguish court-martial offenses in the Army Military Judges Benchbook,[54] which provides the following instruction for court members concerning the decision on whether to adjudge a dismissal as part of a sentence:

> ...a sentence to dismissal...is, in general, the equivalent of a dishonorable discharge. ...A dismissal deprives one of substantially all benefits administered by the Veteran's Administration and the Army establishment. It should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment...

Finally, even if a similar case or two could be identified where the officer's offenses matched those of 1st Lt Thomas, the "confidence" standard derived from the *Sales* progeny would still not be met. A small sample population will not reveal whether the sentence of dismissal was within the norm or an

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[53] *See* Rules for Courts-Martial, 1003(c)(2)(A)(iv).
[54] DA Pam 27-9 (September 1996).

"outlier." Only a sufficiently large sample population (of officer court-martials) and virtual unanimity in those results yields "confidence" that the sentences are reliable and that the results are stable.

4. NMCCA erred in its sentence reassessment because it did not compare and contrast the sentencing landscape before and after the prejudicial error was corrected to determine whether there was a "dramatic change in the penalty landscape."[55]

The sentencing landscape in this case changed dramatically as a result of NMCCA's decision: There were no longer findings of an ongoing adulterous affair over a period of years, an instance of sodomy, or an extensive list of instances of sexual harassment and fraternization. In fact, *nineteen of twenty-one specifications* were whittled away by the time of reassessment. The maximum sentence was no longer confinement for *twenty-two years*, but confinement for only *one year*.[56] The sentencing body would now have before it only two specifications of conduct unbecoming an officer consisting of, in the words of the military judge, inappropriate sexual "banter."[57] As under *Buber* and *Riley*, when there was such a dramatic change in the penalty landscape, as in this case, the only fair course of action was a sentencing rehearing.[58]

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[55] *Buber* at 479, quoting *Riley*, 58 M.J. at 312.
[56] *Cf.* Record at 104, M.C.M. ¶59(e).
[57] Record at 130.
[58] *Buber* at 480, quoting *Riley*, 58 M.J. at 312.

5. NMCCA erred in its reassessment because it did not provide any measure of "confidence" that the sentence was no greater than would have been imposed at trial if the prejudicial error had not been committed.[59]

In *Buber,* the Army court, despite having its sentence set aside, tried to set out some criterion for its reassessment in that case by enumerating the "serious circumstances of appellant's lie" concerning a possible murder, "our collective experience," and "the principles of *Sales*."[60] In addition, the Army court contrasted Buber's conviction with the positive aspects of his performance, stating he was "in the top five percent of noncommissioned officers. He was dependable and demonstrated initiative, tenacity, and creativity."[61] Despite the Army court's effort to set out a brief paradigm to reassess Buber's sentence, the CAAF still found its reasoning to be an abuse of discretion because it could not convey any "degree of certainty" or sense of "confidence" that its sentence would have been imposed at trial.[62]

In contrast to *Buber*, however, NMCCA set out no criteria to reassess the sentence in this case, and was completely silent regarding 1st Lt Thomas' good military character, positive traits and the other mitigating factors in his case. As it lacks even those minimum criteria of the Army court in *Buber*, 1st Lt Thomas' case is better postured for a sentence rehearing.

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[59] *Buber* at 479, quoting *Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999).

[60] *Id.* at 478.

[61] *Id.* at 477-478.

[62] *Id.* at 479.

NMCCA simply offered a minimalist conclusory statement that two separate instances of conduct unbecoming an officer, including what it mischaracterized as a *quid pro quo* offer by 1st Lt Thomas for time off from work in return for sex from a subordinate female Marine was "unconscionable."[63]

NMCCA's statement may be a valid moral judgment, but it does not adequately articulate grounds for a sentence reassessment. Not every "unconscionable" act committed by an officer — whether drinking while driving, berating subordinates, and fighting with a peer or any of a host of such unacceptable behaviors — requires a trial by court-martial, never mind do such acts require a dismissal. In fact, the lower court has even called the Government's failure to explain excessive post-trial delay "unconscionable."[64] And "unconscionable" post-trial delays have never amounted to chargeable offenses under the UCMJ (*e.g.*, dereliction of duty). Instead, 1st Lt Thomas' case could have been referred to an NJP, summary court martial or special court martial, not a general court martial.[65]

In *Buber*, the CAAF observed that "the admissible evidence at sentencing may have significantly changed...where, as here, the Court of Criminal Appeals sets aside significant findings of guilt and reassesses the sentence, the court should

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[63] *United States v. Thomas*, No. 200401149, slip. op. (N-M. Ct. Crim. App. June 20, 2006), p. 2.

[64] *United States v. Adams*, 65 M.J. 552, 562 (N.M.Ct.Crim.App. 2006), n8; 2006 CCA LEXIS 332, *20.

[65] *See, for example, United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000).

provide a more illuminating explanation of the aggravation evidence it considered upon reassessment." To the prejudice of 1st Lt Thomas, NMCCA failed to heed the CAAF's direction to provide an "illuminating explanation" of the aggravation evidence it considered in its reassessment.

6. NMCCA erred in its reassessment because it did not address the custom and practice of the armed services to consider other administrative remedies available in a case such as this.

Inappropriate sexual conduct or conversations do not always result in court-martial proceedings or dismissals. With evidence of several instances of inappropriate sexual conversation over a one-day period, a superior officer may have relieved 1st Lt Thomas of his duties, transferred him, revoked his promotion to Captain, verbally counseled him, withheld any number of his privileges, given him Extra Military Instruction (EMI), drafted an adverse fitness report, issued him a non-punitive letter of caution, urged him to resign, or subjected him to Article 15, UCMJ, nonjudicial punishment.

Cases involving officer misconduct in the military and centered on inappropriate sexual activity often result in far less than a court-martial or a dismissal. In 2005, the Defense Department reported 374 cases of sexual assaults across all branches of the military, but pursuant to Defense Department policy, it will not release any data on the number of reports of

sexual harassment.[66] By comparison, nineteen percent of reserve women reported experiencing sexual harassment and two percent reported that they had been sexually assaulted.[67] If the numbers for sexual harassment were roughly proportionate in the active components, such incidents would be huge – numbering in the tens of thousands. Comparing the total number courts-martial each year in the armed forces with the much smaller number of sexual harassment prosecutions leads to the conclusion that most incidents do not lead to prosecution. Commands are thus using alternative measures to deal with the problem, "and though some people suspected of adultery are prosecuted, convicted and drummed out of the service, others receive lectures, reprimands or fines and are told to carry on."[68]

In Appendix E, at 10a-13a, 1st Lt Thomas provides the same catalogue of military cases he argued before the CAAF to document his claim that two specifications of inappropriate sexual conversation would be unlikely to result in a court-martial or dismissal.

7. NMCCA erred in its sentence reassessment because it may have improperly considered, *sub silencio*, conduct in its reassessment that should not have been before the court at all.

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[66] Carol Burke, *San Francisco Chronicle*, "U.S. Soldier Goes AWOL—Alleges Sexual Harassment," September 15, 2006.

[67] Air Force Link, "DOD Releases Sexual Harassment, Assault Reports," December 23, 2005.

[68] Elaine Sciolino, *New York Times*, "Accused B-52 Pilot Weighs Her Options, Including Resignation," May 16, 1997.

Customarily, appellate courts abide the legal fiction that military judges will perform their duties lawfully and will simply ignore what they are not permitted to consider.[69] However, a vast majority of the appellate exhibits, testimony and record of trial contained instances of misconduct that were not subject to sentencing. The sheer volume of adverse material could reasonably be expected to taint even the most impartial judge. 1st Lt Thomas therefore deserves a sentence rehearing focused only on the two remaining specifications of conduct unbecoming an officer, with no extrinsic charges and specifications. Such a sentence rehearing will avoid the intractable problem of "spillover," where 'uncharged' misconduct improperly influences an appellant's sentence.

This Honorable Court should grant review of 1st Lt Thomas' case because, by improperly reassessing 1st Lt Thomas' sentence, NMCCA ignored applicable decisions of the CAAF,[70] specifically, the line of cases under *United States v. Sales.*[71]

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[69] *See*, for example, *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) "military judges are presumed to know the law and to follow it, absent clear evidence to the contrary. . . "

[70] *See* United States Court of Appeals for the Armed Forces Rules of Practice and Procedure, Rule 21(b)(5)(B)(as amended through Oct. 1, 2004).

[71] 22 MJ 305 (CMA 1986); including *United States v. Buber*, 62 M.J. 47 (C.A.A.F. 2006); *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003); *United States v. Vasquez*, 54 M.J. 303, 306 (C.A.A.F. 2001); *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999).

CONCLUSION

First Lieutenant Thomas respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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July 2008

Appendix A

UNITED STATES, Appellee,

v.

Raymon F. THOMAS, First Lieutenant, U.S. Marine Corps, Appellant.

No. 06-0918

Crim. App. No. 200401149.

United States Court of Appeals for the Armed Forces

April 25, 2008

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, said petition is hereby granted, and the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Appendix B

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.
BEFORE
E.E. GEISER F.D. MITCHELL J.G. BARTOLOTTO

UNITED STATES

v.

Raymon F. THOMAS, Jr.
First Lieutenant (O-2), U.S. Marine Corps

NMCCA 200401149 Decided 19 June 2007

Sentence adjudged 02 August 2002. Military Judge: E.W. Loughran. Staff Judge Advocate's Recommendation: Col R.M. Favors, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT ROBERT E. SALYER, JAGC, USN, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a general-court martial, of four specifications of conduct unbecoming an officer and one specification of wrongful sexual intercourse, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934.[1] The appellant was sentenced to dismissal and confinement for 165 days. The convening authority approved the sentence as adjudged.

We previously set aside some of the approved findings and affirmed the remainder of the findings and the sentence in an unpublished decision issued on 20 June 2006. On 2 May 2007, our superior court set aside our decision because the text of our previous opinion was ambiguous. The case was remanded to this court for clarification as to the affirmed findings. *United States v. Thomas*, _ M.J. _ 2007 CAAF LEXIS 594 (C.A.A.F. May 2, 2007).

We have carefully reexamined the record of trial, the three assignments of error,[2] the Government's response, and our previous decision. We again find the appellant's second assignment of error has merit and will take corrective action with respect to the

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[1] The appellant's pleas were conditional on his right to appeal the military judge's decision to admit an e-mail message seized from the appellant's Government e-mail account during a warrantless search.

[2] I – military judge erred when he refused to hold the appellant's court-martial in abeyance until such time as the military judge's independence was assured by a measure fixing his term of office (Grostefon); II - military judge erred when he refused to suppress an e-mail message obtained during a warrantless search of the appellant's government e-mail account; and III - post-trial processing delay.

approved findings in our decretal paragraph. Following our corrective action, we conclude that the remaining findings and the approved sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. *See* Arts. 59(a) and 66(c), UCMJ.

Conclusion

The appellant's first and third assignments of error are without merit. With regard to the appellant's second assignment of error, the findings of guilty to Specifications 1 and 2 of Charge III and to Specification 2 of Charge IV are set aside for the reasons we stated in our earlier opinion. The remaining approved findings of guilty to Specifications 3 and 4 of Charge III are affirmed. We have reassessed the sentence in accordance with the principles of *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples,* 29 M.J. 426, 428-29 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). We note that the affirmed charge and specifications reflect two separate instances of conduct unbecoming an officer to include a specific *quid pro quo* offer by the appellant of time off of work in return for sex from a subordinate female Marine. This is unconscionable. The approved sentence is no greater than that which would have been imposed at trial if the prejudicial error had not been committed, is appropriate, and is affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix C

UNITED STATES, Appellee,

v.

Raymon F. THOMAS, First Lieutenant, U.S. Marine Corps, Appellant.

No. 06-0918

Crim. App. No. 200401149.

United States Court of Appeals for the Armed Forces

May 2, 2007

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is noted that that court set aside Specifications 1 and 2 of Charge I (violation of a lawful regulation), Specifications 1 and 2 of Charge II (maltreatment by sexual harassment), Specifications 1 and 2 of Charge IV (adultery), and the Specification of the Additional Charge (fraternization).

The court then stated that the remaining approved findings of guilty were affirmed. In fact, Charge II and all five of its specifications had been withdrawn by the Government as part of the plea agreement and dismissed.

Moreover, Specification 1 of Charge I and Specification 1 of Charge IV were merged into Specification 2 of Charge III (conduct unbecoming an

officer). Likewise, Specification 2 of Charge I and the Additional Charge and its Specification were merged into Specification 1 of Charge III (conduct unbecoming an officer).

Despite the court's broad statement that the remaining findings of guilty were affirmed, it then suggested that "[t]he affirmed charges and specifications reflect two separate instances of conduct unbecoming an officer to include a specific *quid pro quo* offer by the Appellant of time off from work in return for sex from a subordinate female Marine."

In fact, four specifications of a single charge of conduct unbecoming an officer remained. Under Article 67(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(c) (2000), this Court can only act with respect to findings as affirmed by a court of criminal appeals.

Accordingly, because of the ambiguity as to the affirmed findings, it is ordered that said petition is hereby granted. The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside, and the record of trial is returned to the Judge Advocate General of the Navy for remand to the United States Navy-Marine Corps Court of Criminal Appeals for clarification as to the affirmed findings.

Appendix D

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.
BEFORE
E.E. GEISER F.D. MITCHELL J.G. BARTOLOTTO

UNITED STATES

v.

Raymon F. THOMAS, Jr.
First Lieutenant (O-2), U.S. Marine Corps

NMCCA 200401149 Decided 19 June 2007

Sentence adjudged 02 August 2002. Military Judge: E.W. Loughran. Staff Judge Advocate's Recommendation: Col R.M. Favors, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT ROBERT E. SALYER, JAGC, USN, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a general-court

martial, of four specifications of conduct unbecoming an officer and one specification of wrongful sexual intercourse, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934.[3] The appellant was sentenced to dismissal and confinement for 165 days. The convening authority approved the sentence as adjudged.

We previously set aside some of the approved findings and affirmed the remainder of the findings and the sentence in an unpublished decision issued on 20 June 2006. On 2 May 2007, our superior court set aside our decision because the text of our previous opinion was ambiguous. The case was remanded to this court for clarification as to the affirmed findings. *United States v. Thomas*, _ M.J. _ 2007 CAAF LEXIS 594 (C.A.A.F. May 2, 2007).

We have carefully reexamined the record of trial, the three assignments of error,[4] the Government's response, and our previous decision. We again find the appellant's second assignment of error has merit and will take corrective action with respect to the approved findings in our decretal paragraph. Following our corrective action, we conclude that the remaining findings and the approved sentence are

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[3] The appellant's pleas were conditional on his right to appeal the military judge's decision to admit an e-mail message seized from the appellant's Government e-mail account during a warrantless search.

[4] I – military judge erred when he refused to hold the appellant's court-martial in abeyance until such time as the military judge's independence was assured by a measure fixing his term of office (Grostefon); II - military judge erred when he refused to suppress an e-mail message obtained during a warrantless search of the appellant's government e-mail account; and III - post-trial processing delay.

correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. *See* Arts. 59(a) and 66(c), UCMJ.

Conclusion

The appellant's first and third assignments of error are without merit. With regard to the appellant's second assignment of error, the findings of guilty to Specifications 1 and 2 of Charge III and to Specification 2 of Charge IV are set aside for the reasons we stated in our earlier opinion. The remaining approved findings of guilty to Specifications 3 and 4 of Charge III are affirmed. We have reassessed the sentence in accordance with the principles of *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples,* 29 M.J. 426, 428-29 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). We note that the affirmed charge and specifications reflect two separate instances of conduct unbecoming an officer to include a specific *quid pro quo* offer by the appellant of time off of work in return for sex from a subordinate female Marine. This is unconscionable. The approved sentence is no greater than that which would have been imposed at trial if the prejudicial error had not been committed, is appropriate, and is affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix E

Military Officer Cases Involving Sexual Misconduct Or Maltreatment Of Subordinates Not Resulting In A Court-Martial Or Dismissal

The below cases [submitted to the CAAF in the record below] demonstrate that "unconscionable" conduct does *not* necessarily result in a court-martial or dismissal. Misconduct results in dismissal only under extraordinary circumstances.

LCDR Johnna Thomas, US Navy, a doctor in Japan, and Cpl Shannon Schaffer, US Marine Corps, were involved a lesbian love affair in Japan. On June 19, 2003, an Article 15, UCMJ, nonjudicial punishment (NJP) proceeding was held at U.S. Naval Hospital, Yokosuka, Japan. LCDR Johnna Thomas, USN faced charges of fraternization. LCDR Thomas received a reprimand[5] and resigned from the Navy within a year. Today, she is a civilian doctor in Virginia.

Corporal Schaffer, the enlisted military police interrogator at Iwakuni, received a Summary Court Martial on 7 August 2003. Her sentence was restriction for 30 days to her place of residence, work, worship and mess. Corporal Schaffer then received a general discharge under honorable conditions.[6]

Air Force General Joseph Ralston lost his promotion to be the Chairman of the Joint Chiefs of Staff after admitting that he had had an affair with

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[5] Article 15 notes, SJA Office, Yokosuka, Japan, June 19, 2003.
[6] Id.

a civilian woman at the CIA in 1984.[7] He retired in 2003.[8]

Army four-star General Kevin P. Byrnes was relieved of his command as head of the Army's Training and Doctrine Command due to an extramarital affair. He retired a few months later in 2005.[9]

Navy Vice Admiral Richard J. Naughton resigned as the superintendent of the Naval Academy and requested to be reassigned after a Navy Inspector General's report revealed that he reacted angrily to a sentry's request that he produce proper identification and improperly grabbed the Marine's arm and began to verbally abuse him. The report also stated that on several occasions, Vice Adm. Naughton "embarrassed and humiliated subordinates through conduct that is inappropriate for a commander."[10] Vice Adm. Naughton then retired to become CEO of a high-technology government contractor.[11]

Army Major General John Longhouser decided to retire after admitting that he committed adultery.[12]

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[7] Eric Schmitt, *New York Times*, "In Aftermath of Troubles, Redemption for a General," February 5, 1998, A.18.

[8] Lisa Burgess, *Stars and Stripes*, February 14, 2003.

[9] Josh White, *Washington Post*, "4-Star General Relieved of Duty: Rare Move Follows Allegations of Extramarital Affair," August 10, 2005.

[10] Thom Shanker, *New York Times*, *"Admiral Quits Top Position at Academy," June 5, 2003.*

[11] Freshnews.com, "Vice Admiral Richard J. Naughton, USN, Ret., Named CEO of Xenonics," April 18, 2005.

[12] *Milwaukee Journal Sentinel*, "General Retires Over Love Affair," June 3, 1997. Because he had not completed the required three years as a two-star general, he retired at the rank of one-star, or Brigadier General.

Navy Rear Admiral R. M. Mitchell Jr. decided to retire after he was relieved of command for making repeated advances toward a female subordinate.[13]

The Judge Advocate General of the Air Force, Major General Thomas J. Fiscus, retired as a colonel after being reprimanded in a nonjudicial proceeding for several sexual affairs and improper conduct with more than a dozen female subordinates – including officer, enlisted and civilian personnel. The Air Force Inspector General concluded that the two-star general's actions constituted conduct unbecoming an officer, engaging in unprofessional relationships, fraternization and obstruction of justice.[14]

The Air Force Judge Advocate General's was similar to Appellant's case, except it impacted many more victims and went on for much longer. As a married man, MG Fiscus wrongfully and dishonorably engaged in an unprofessional relationship and exchanged inappropriately intimate e-mail with a subordinate while pursuing a romantic or sexual relationship outside his marriage. Other specifications involved inappropriate touching and kissing, fraternization with a noncommissioned officer, and misuse of government e-mail. Another specification accused the general of attempting to hinder the investigation by deleting incriminating e-

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[13] *New York Times*, "Accused Admiral Seeks Retirement," June 7, 1997.

[14] *Air Force Link*, "AF's former top military lawyer to retire in reduced rank," January 10, 2005; *Air Force Link*, "AF issues Article 15 to top military lawyer," January 10, 2005; *Air Force Link*, "Judge Advocate General Steps Down Amid Investigation," September 30, 2004.

mails from his government computer.[15] In the words of NMCCA, MG Fiscus's conduct was "unconscionable." Nevertheless, he was neither court-martialed nor dismissed, but was permitted to retire.

Retired two-star Army general David Hale was reduced in his retirement to the rank of Brigadier General for misconduct, including adulterous affairs with wives of four officers under his command.[16] MG Hale pled guilty to seven counts of "conduct unbecoming an officer and a gentleman" and one count of making false official statements. He was sentenced to a reprimand, a $10,000 fine and the forfeiture of $1,500 per month for 12 months.[17] Yet MG Hale preserved his retirement.

Navy Rear Admiral Ralph Tindal was given a punitive letter, fined $7,600, placed under arrest in quarters for 30 days, and allowed to retire at the lower rank of rear admiral lower half, after he was found guilty of adultery and sexual harassment.[18]

Navy Rear Admiral Steven Kunkle was relieved as the USS Kitty Hawk Battle Group commander after he received a letter of reprimand following a non-judicial punishment for an "inappropriate

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[15] *Id.*

[16] Steven Lee Myers, *New York Times*, "Ex-General Is Charged With Lying And Adultery," December 11, 1998. U.S. Army Office of Public Affairs, "U.S. Army Announces Rank Reduction of Major General David R.E. Hale," September 2, 1999.

[17] Mark Thompson, *TIME*, "Sex, The Army And A Double Standard, A general allegedly coerced an officer's wife into an affair. Why did he get off so easy?" May 4, 1998.

[18] CNN.com, "Navy Admiral Punished for Adultery and Sex Harassment," December 9, 1995.

relationship" with a female naval officer, even though he was married.[19]

Navy Rear Admiral John Scudi requested retirement after he was relieved as head of the office that handles millions of dollars in defense contracting each year because he was having two adulterous affairs with a defense contractor and a senior Navy civilian employee.[20]

Air Force Brigadier General Richard S. Hassan, former director of the Air Force Senior Leader Management Office, accepted nonjudicial punishment and received a letter of reprimand and a $2,000 fine as a result of "inappropriate relationships" with female subordinates in his office, sending them sexually explicit e-mail and graphic photographs to them via his government computer, and rubbed their feet. He was permitted to retire as a colonel.[21]

Army Brigadier General Stephen Xenakis decided to retire after he was removed from command for an "improper relationship" with a

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[19] *Stars and Stripes*, "A Year of Trials and Tragedy," January 2, 2004; Rick Chernitzer, Stars and Stripes, "Kunkle is relieved as commander of USS Kitty Hawk Battle Group," February 14, 2003.

[20] *Milwaukee Journal Sentinel*, "Navy Admiral Accused of Adultery, Ethics Violations Involving Defense," November 26, 1998; CNN.com, "Admiral Charged With Adultery and Ethics Violation," November 25, 1998.

[21] Josh White, *Washington Post*, "General Accused Of Harassment Is Demoted: Air Force Report Says Hassan Made Overtures to Female Subordinates," February 9, 2006; Page A21.

civilian nurse who was taking care of his ailing wife.[22]

Air Force Brigadier General Robert T. Newell was relieved of command and demoted to colonel after being accused of inappropriate contact with a female subordinate, twice embracing her motivated by lust. He was permitted to voluntarily retire.[23]

Navy Rear Admiral John W. Snyder, commanding officer of Patuxent River Naval Air Station, was fired after the excessive drinking, foul language, crude behavior, disrespect shown toward women and at least eighty-three sexual assaults against women at the Tailhook Association's 1991 convention in Las Vegas.[24] He was permitted to retire.

Three admirals in charge of the Navy's investigation of Tailhook 1991 were relieved of their commands for participating and/or tolerating sexual harassment there. Two, including Rear Admiral Duvall M. Williams Jr., were forced to take early retirement, while a third, the Naval Inspector General, was reassigned.[25]

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[22] Mark Thompson, *TIME*, "Military Kiss And Tell," June 16, 1997. Brig. General Xenakis retired from the Army in 1998. *See* Generals Letter to Senator McCain, October 3, 2005, at www.humanrightsfirst.org/us_law/etn/pdf/mccain-100305.pdf.

[23] *New York Times*, "Air Force Demotes General," December 27, 1996; David Hackworth, Defending America, "Different Spanks for Different Ranks," 1 April 1997.

[24] *Inspector General, Department of Defense*, Tailhook 91. Parts I and II, *February 1993 (Derek J. Vander Schaaf, the Deputy Inspector General of the U.S. Department of Defense); Frances K. Pohl*, Gender Politics, *"Tailhook '91: Women, Violence, and the U.S. Navy," June 1994.*

[25] Id.

The files of 140 officers were referred by Navy Inspector General Vander Schaaf to the Acting Secretary of the Navy for consideration of appropriate action. Of these officers, twenty-three were determined to warrant referral to the Navy for having participated in indecent assaults. Only three men were officially charged with any criminal wrongdoing after Tailhook; Marine Captain Gregory J. Bonam, LT David Samples, USN, and CDR Gregory E. Tritt, USN, were charged with indecent assault. A fourth officer, J. Cole V. Cowden was charged with conduct unbecoming an officer. The cases against all four were dismissed.[26]

Air Force Colonel William Kalaskie, the outgoing 425th Air Base Squadron commander in Izmir, and Lieutenant Colonel Dwight Harris, his designated successor, were relieved of duty amid allegations that they had inappropriate relations with women under their command.[27] Navy Captain Scott Bawden was recently relieved as commodore of Submarine Squadron 17 in Bangor, Washington, allegedly because he was involved with the wife of one of his enlisted sailors.[28]

Army Colonel Sammy G. Wiglesworth was relieved of his command of Camp Zama and ordered at nonjudicial punishment to forfeit $3,000 in pay for two months after he misused government services,

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[26] Id.

[27] Lisa Burgess, *Stars and Stripes*, "Other Cases of Alleged Misconduct," European edition, February 14, 2003.

[28] Andrew Scutro, *Navy Times*, "Sub Squadron CO's Ouster Unrelated to Hazing Case," November 08, 2006; see also, www.strategypage.com, "Zipper Control Shakes Up SSBN Community," November 26, 2006; www.libertypost.org/cgi-bin/readart.cgi?ArtNum=166552.

violated joint ethics regulations, and engaged in an improper relationship with the wife of an enlisted servicemember.[29]

Air Force Colonel David Rauhecker was convicted at court-martial of kissing two female aides. He received a reprimand, a fine of $18,000, and was permitted to continue serving in the Air Force.[30]

Army Lieutenant Colonel Eric Criner was relieved of his command at 17th Corps Support Battalion, 45th Corps Support Group, after he tried to arrange a sexual encounter between his wife and one of his subordinate female Sergeants by providing access to her X-rated website and sexually explicit photos the female NCO.[31]

Air Force Roman Catholic chaplain, Lieutenant Colonel Pat Nicholson, was fired from the Air Force Academy after having sex with a female Major, starting when she was a cadet.[32]

Air Force First Lieutenant Kelly Flinn, the Air Force's first female bomber pilot, was permitted to resign in order to avoid a court-martial for adultery, disobeying an order, and lying. 1st Lt Flinn had a casual affair with an enlisted man and a more serious affair with the civilian husband of a junior

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[29] Frank Knapp, *Stars and Stripes*, "Former Camp Zama commanding officer ordered to forfeit pay after investigation," August 11, 2001.

[30] Elaine Sciolino, *New York Times*, "Accused B-52 Pilot Weighs Her Options, Including Resignation," May 16, 1997.

[31] Gregg Kakesako, *Honolulu Star-Bulletin*, "Army Officer Relieved of his Battalion at Schofield," July 29, 2004; Debra Barayuga, *Honolulu Star-Bulletin*, "Couple Sues Over Explicit Photos," July 30, 2004.

[32] Jane Lampman, *The Christian Science Monitor*, "A wider circle of clergy abuse: As US bishops meet, attention is drawn to female victims of priests," June 14, 2002.

enlisted airman, who told the Secretary of the Air Force, "Less than a week after we arrived to the base, Lt Flinn was in bed with my husband having sex."[33] She escaped any punishment, resigned, and was granted a general discharge.

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[33] Kate O'Beirne, *National Review*, "Bread & Circuses – Military Discharge of Kelly Flinn for Adultery," June 16, 1997.